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Supreme Court of the United States

OCTOBER TERM, 1941

No. 538

HARRY N. SOUTHARD,
Petitioner,

v.

HARRY JACKSON, Warden, State Prison of Southern Michigan, Jackson, Michigan,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF MICHIGAN

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I

CONCISE STATEMENT OF CASE

Petitioner seeks a writ of certiorari to review an opinion (R. 22) and order (R. 28) of the supreme court of the State of Michigan, dismissing a writ of habeas corpus to inquire into the cause of his imprisonment and detention by the warden of the state prison of southern Mich-

igan (R. 14, 15), and an ancillary writ of certiorari directed to the judge of the trial court before whom petitioner had been convicted of a criminal offense (R. 17).

In the trial court, on the 1st day of November, 1933, petitioner was duly convicted of the statutory crime of robbery while armed with a dangerous weapon (R. 11, 12, 13), upon an information charging it to be a third offense (R. 8, 9) for which augmented punishment was, and is, provided, and was thereupon sentenced to be confined in the Michigan state prison for a minimum term of fifteen (15) years, a maximum term of twenty-five (25) years (R. 20). A motion to vacate the sentence was denied by the circuit judge on March 14, 1936 (R. 20, 21); a motion to reduce sentence was denied March 29, 1938 (R. 21); and a further motion to vacate and discharge the sentence was denied January 7, 1939 (R. 22).

No appeal [in the nature of a writ of error] was taken to the supreme court of the State of Michigan.

Statutes Involved

The Michigan legislature has enacted two separate and distinct codes pertaining to crime and punishment therefor: [1st] the 'Penal Code', defining crimes and prescribing the penalties therefor (Act No. 328, Public Acts 1937, as amended [Comp. Laws Supp., § 17115 (1) *et seq.*, Stat. Ann. § 28.191 *et seq.*]), and [2d] the 'Code of Criminal Procedure', revising, consolidating and codifying the laws relating to criminal procedure and, among other specific things, providing 'for judgments and sentences of persons convicted of criminal offenses' (Act No. 175, Public Acts 1927, as amended (Comp. Laws 1929, as amended, § 17116 *et seq.*, Stat. Ann. § 28.843 *et seq.*)).

Section 529 of the 'Penal Code' (Comp. Laws Supp. § 17115 (529), Stat. Ann. § 28.797) defines the offense of robbery, while armed with a dangerous weapon and provides punishment therefor 'by imprisonment in the state prison for life or any number of years'.

[Appendix 'A', printed at the back of this brief, is a true copy of the foregoing section of the 'Penal Code'].

The 'Code of Criminal Procedure', chapter IX (dealing with 'judgment and sentence'), provides for an indeterminate sentence for a first offense, the trial court to fix the minimum term § 8), while §§ 9-12, incl., thereof (the 'habitual criminal provisions', so-called) provide augmented punishment for second and third offenders (Comp. Laws 1929, § 17336 *et seq.*, Stat. Ann. § 28.1080 *et seq.*).

[Appendix 'B' is a true copy of the foregoing sections of the 'Code of Criminal Procedure'].

Seven years, three months, and twenty-five days after his conviction as a *third* offender, plaintiff sought release on the ground that § 8, chapter 9, of the 'Code of Criminal Procedure', providing an indeterminate sentence for a *first* offender, is unconstitutional.

Petitioner's argument in the Michigan supreme court [boiled down somewhat] was that § 8, *supra*, unlawfully delegates to members of the judicial department of government the legislative power to fix a minimum term of imprisonment for crime, and thus violates the Federal (14th Amendment) and State Constitution § 1, article 4).

Therefore, it was said, the circuit court had no jurisdiction over the person of the petitioner and was powerless to admeasure punishment.

The supreme court of Michigan, in dismissing the writs of habeas corpus and certiorari, held, primarily, that petitioner's more appropriate remedy would have been a timely application for leave to appeal from conviction and sentence, rather than a belated petition for release on habeas corpus; and, secondarily, that, in its opinion, the section of the code under attack was valid and constitutional (R. 22-28).

Article 5, § 28, of the Michigan Constitution provides that

> "Sec. 28. The legislature may provide by law for indeterminate sentences, so-called, as a punishment for crime, on conviction thereof, and for the detention and release of persons imprisoned or detained on said sentences".

Although this section of the State Constitution was not cited or mentioned in the petition for habeas corpus filed with the Michigan supreme court, petitioner's argument in this Court is now based on the new contention that the sections of the code in question violate that section of Michigan fundamental law.

II

OBJECTIONS TO PETITION FOR WRIT

[ARGUMENT]

We submit the following objections to the issuance of the writ of certiorari:—

First: The petition does not contain the 'jurisdictional statement' required by Rule 12 (1) of this Court.

Second: The judgment of the state court was based upon an independent ground of state procedure involving no federal question and broad enough to sustain the order dismissing the writs.

The Michigan supreme court held that petitioner's right of review was by appeal, not by habeas corpus, and observed

> "We have thus repeatedly held that habeas corpus will not be permitted to perform the functions of a writ of error".

This position is well sustained by authority, including that of this Court,

In re Palm, 255 Mich. 632,
In re Gardner, 260 Mich. 122,
In re Long, 266 Mich. 269 [*Long v. Michigan*, 292 U. S. 647, 293 U. S. 629],
In re Van Dyke, 276 Mich. 32 [*Van Dyke v. Michigan*, 299 U. S. 608],
In re Lupu, 285 Mich. 500,

In re Offill, 293 Mich. 416 (writ denied by this court),
In re Brazell, 293 Mich. 632,
In re Stone, 295 Mich. 207.

See, more particularly,

Doyle v. Atwell, 261 U. S. 590.

Third: Petitioner was not sentenced under authority of that section of the 'Code of Criminal Procedure' which he attacks, and is not in position to complain of its validity,

People v. Cook, 147 Mich. 127.

Furthermore, he was subject to life imprisonment, in any event, under the 'Penal Code'.

Fourth: The point now urged in petitioner's brief (that § 8, chapter 9, Code of Criminal Procedure, violates article 5, § 28, of the Michigan Constitution) was not raised in the court below, and should not be considered here,

Young v. Masci, 289 U. S. 253.

Fifth: Petitioner's objection that the state statute here in question involves an unconstitutional delegation of legislative power does not present a Federal question which this Court may consider,

Ohio ex rel. Bryant v. Akron Metro. Park Dist., 281 U. S. 74.

The case of *Ughbanks v. Armstrong*, 208 U. S. 481, considering the indeterminate sentence law of Michigan, may be helpful.

III

CONCLUSION

For the several reasons set forth in this brief, we respectfully submit that the writ of certiorari should be denied.

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For Respondent.